IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 13TH FEBRUARY 2007 / 24TH MAGHA 1928

Crl.Rev.Pet.No. 14 of 1997

CRA.94/1996 of SESSIONS COURT, KASARAGOD
CC.70/1992 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD
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REVN. PETITIONER/ APPELLANT/ACCUSED:

K.V. UTHAMAN, S/O. LATE VASU,
RESIDING NEAR KASARAGOD NURSING HOME,
P.O. KASARAGOD - 671 121,
KASARAGOD DISTRICT.

BY ADV. SRI.M.RAMESH CHANDER
SRI.V.RAMKUMAR NAMBIAR

RESPONDENT/RESPONDENT/COMPLAINANT:

SUB INSPECTOR OF POLICE,
KASARAGOD, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.K. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.Rev.Pet.No.14/1997

Order on Crl.M.P.No.35/1997 in Crl.Rev.Pet.No.14/1997

Dismissed.

13.02.2007 **Sd/- K. HEMA, JUDGE.**

// True Copy //

P.A. to Judge.

smp

K. HEMA, J.

CRL. R.P. No. 14 OF 1997

Dated this the 13th day of February, 2007.

O R D E R

A private complaint was filed against petitioner, alleging offences under Sections 415, 417, 420, 463, 466, 471 of Indian Penal Code (IPC, for short) and 138 of Negotiable Instruments Act. The complaint was forwarded to the police under Section 156(3) of Cr.P.C. and, after investigation, a charge sheet was laid for offence under Section 420 IPC. The revision petitioner stood trial for the said offences before the Magistrate's Court.

2. After trial, the revision petitioner was sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.20,000/- and in default of payment of fine to undergo simple imprisonment for one month, by the learned Chief Judicial Magistrate. In appeal, the learned Sessions Judge modified and reduced the sentence to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.20,000/- and in default to undergo rigorous imprisonment for a further period of one year. The direction passed by the Magistrate's Court under

Section 357(1) of the Code of Criminal Procedure was upheld. The said conviction and sentence passed against the revision petitioner are challenged in this revision.

3. As per the allegations in the complaint, a loan of Rs.15,000/- was advanced by PW3-complainant to the revision petitioner. When the complainant requested to return the amount, he issued a cheque (Copy is Exhibit P3) dated 15.12.1990 towards discharge of the said debt. But, it was returned due to insufficiency of funds. Notice was hence, issued demanding payment. But, the accused evaded service of notice. However, he accepted the second notice dated 08.05.1991. Later, there was an intervention of mediators and on 25.05.1991, the matter was settled between the parties, and as per the terms of compromise, the accused paid Rs.1,000/- and issued Ext.P2-cheque for Rs.14,000/- by putting the date as 17.08.1991. At the time of issuing the said cheque, the accused made the complainant to believe that sufficient fund would be available in his account and that he would be getting the amount on 17.08.1991. The cheque was issued in the presence of PW4.

4. On presentation, the cheque, Ext.P2 was returned with an endorsement “drawer's signature differs from specimen given” and also “funds insufficient”. A lawyer notice was issued, which was evaded by the revision petitioner and hence, a telegram was also issued. On an enquiry made with the bank, it was revealed that the cheque-leaf (which was allegedly forged as Ext.P2) stood in the name of PW8. On enquiries made with PW8, the complainant came to know that she was undergoing life imprisonment in Central Prison, Kannur in a murder case (as SC.No.59/89 on the file of Sessions Judge, Kasaragod), for having committed murder of the accused's brother Pavithran. The accused thus, deceived the complainant, by intentionally issuing the cheque from the account standing in the name of PW8.

5. To prove the prosecution case, prosecution examined PWs 1 to 11 and marked Exhibits P1 to P14. The accused marked Exhibits D1 and D2 on his side.

6. According to the accused, he is totally innocent of the allegations made. PW3 was conducting an unlicensed 'Kuri' business, in which, PW4 was a partner. The accused's brother, deceased Pavithran, had taken a kuri from the complainant and

received money from PW3. But, he was murdered by his lover, PW8. In the murder case, accused herein gave evidence against PW8 and she was convicted for murder and sentenced to life imprisonment. The complainant and PW4 had helped PW8 to conduct the said case. PW3, the complainant wanted the accused to pay the money which deceased Pavithran had received in the kuri. But, he denied his liability to pay the same and hence, a false complaint was filed against him by the complainant, in conspiracy with PW4 and PW8. He did not owe any money to the complainant, PW3.

7. Both the courts below held that money was given by complainant to accused, and that for the discharge of the debt, he issued Ex-P3 cheque and that there was a settlement thereafter, and another cheque was also issued etc. But, such findings and conclusions are perverse and contrary to the evidence adduced in this case. The borrowal of money itself was not proved by complainant. The case of the complainant is that an amount of Rs.15,000/- was borrowed by the accused from the complainant. But, accused denied this fact and contended that complainant did not give any amount to him, since he had no

money with him on the day on which he allegedly gave money. He established the said fact also.

8. Though the complainant did not allege in complaint on which date it was given, as per the chief examination, his definite case was that money was given to accused on 15.12.1990. The complainant as PW3, deposed in chief examination that accused borrowed the money on 15.12.1990, promising to return it on the same day. In the cross examination, when he was effectively confronted with his inability to raise money on the said date, and PW3 came up with another date. He deposed that money was given by him on yet another date viz., 25.12.1990. The lower appellate court also held that the capacity of the complainant to advance the amount is totally irrelevant and that there is no merit in the contentions raised. It was also held that the attempt made by the accused in bringing out in cross examination with the help of Exts.D1 and D2 that PW3 would not have had any money with him to advance Rs.15,000/- to the revision petitioner was futile. Needless to say that this approach is wholly perverse.

9. The complainant also stated that the amount given was the sale consideration which the complainant obtained on sale of a property. But, it was brought out in evidence that the accused received the sale consideration only much after the date on which he allegedly gave the money. Apart from this, it is brought out from the evidence that even before the liability arose, the cheque Ext.P3 was issued by the accused towards the alleged discharge of the debt.

10. According to complainant, first cheque-Ext.P3 was issued by accused to complainant on 17.02.1990. But, as per the version given by complainant in the court, the money was borrowed on 25. 02. 1990. That is, much after the date on which the cheque was given. If PW3-complainant is believed, if follows that even before the liability arose, the cheque was issued by the accused towards the alleged discharge of the debt.

11. These discrepancies themselves are more than sufficient to hold that the case set up by the complainant that the complainant failed to prove his case that Rs.15000/- was given to the accused on 15.12.1990 and that the cheque was issued for the discharge of such debt etc. To prove the borrowal of the

amount, there is only the highly interested version of PW3, which is not supported by any other evidence. The solitary evidence of PW3 thus, does not prove that Rs.15000/- was given by the complainant to the accused, and that Ext.P3-cheque was issued under the circumstances alleged by him. The issuance of the other relevant cheque Ext.P2 is a consequent act but, the very foundation of the case set up is shaky, since the borrowal and issuance of Ext.P3 for discharge of the debt was not established.

12. But, the lower appellate court curiously held that the oral evidence given by PWs 1 and 2 was not challenged in cross examination, and hence it is proved by their evidence that the cheque-Ext.P3 was issued for the discharge of a liability of Rs.15,000/- which was "due from the appellant to PW3". Neither PW1 nor PW2 who are the officials from the bank, has any direct knowledge about the borrowal and they did not speak anything about the alleged transaction also. Only because the cheque is dishonoured by the bank, as per the evidence of PW1 and PW2, it will be perverse to enter a finding that the amount was due from the complainant to the accused, on the basis of such evidence.

13. The lower appellate court committed other serious factual errors also, in entering crucial findings against the accused. It was found that no serious attempt was made by the revision petitioner to dispute the transaction under Ext. P3-cheque. In fact, evidence of PW3 was challenged at length, it was also brought out in evidence that no amount was paid by the complainant to the accused. Documents were also produced by accused to prove that complainant did not have money on the date on which money was allegedly given and this drove the complainant to change the date of borrowal from 15.02.1990 to 25.02.1990.

14. The absence of issuance of a reply notice was taken as a ground to hold that there was a money transaction between the accused and PW3. There can be no doubt that when the evidence of PW3 is contradictory on the transaction, the absence of issuance of a reply notice ought not to have been taken as a ground to hold that the prosecution has proved this case.

15. But, despite all these, lower appellate court found fault with accused for not advancing a "plea of discharge" by the accused. In fact, accused never advanced any plea of discharge.

His definite case was that he did not owe any money to complainant and he also did not pay any amount to complainant, in discharge of any liability. When the case of accused is that no amount was borrowed and he also successfully established the same, how can the appellate court expect him to advance such a plea? Though no such plea was taken, the appellate court surprisingly, took pain to discuss at length about an alleged "plea of discharge" by the accused in paragraph 13.

16. The lower appellate court even found fault with the revision petitioner, in not making any whisper regarding the discharge, in the cross examination of PW3. The lower appellate court criticized that there was no whisper that the amount due under Ext.P3 was paid and discharged after the same was dishonoured by the bank. It was held that the theory of discharge by actually making the payment is not even suggested to PW3 and not even mentioned while questioned under Section 313 Cr.P.C. Thus, the lower court was perverse in its approach, even in understanding the defence case. All the criticism levelled against accused in not making any whisper in the cross examination of PW3, at the time of questioning under

Section 313 Cr.P.C., in not making any suggestions to PW3 etc., are unwarranted, since accused did not raise any plea of discharge at all.

17. The lower court also proceeded on a wrong factual basis in paragraph 14 of the judgment that "both agree" that there was a settlement. The revision petitioner never raised a case that there was any settlement. The revision petitioner never admitted that there was any settlement. His definite case is that this is a falsely foisted case, in conspiracy with PW8 and he did not owe any money at all to complainant and therefore, he never took up a plea of any settlement also. But, the appellate court entered a finding that "both agree" that a settlement was reached etc. This is also totally inconsistent with the evidence on record and also, the defence set up by the accused. Thus, the whole approach was perverse.

18. The appellate court proceeded on its own surmises and conjectures and not on the basis of evidence adduced in this case or the case set up either by the prosecution or by the accused. The lower appellate court also failed to understand even the defence case and made serious mistakes in making factual

conclusions. The court below held that PW8 is the sister-in-law of the revision petitioner. The case of the accused is that PW8 is his brother's lover and she murdered him as he decided to marry another woman, after ditching her. This fact was more or less admitted by PW8 in the evidence. She admitted that herself and accused's brother were in love and the alleged motive for the crime was the attempt made by the deceased to marry another woman by ditching his lover, PW8. Still, the appellate court entered a finding that it was very easy for accused to procure cheque of his sister-in-law after his brother's death.

19. The defence case is that since the accused gave evidence against PW8 in the murder case and as she was convicted, a false case was foisted against him, in pursuance of a conspiracy between PWs 3, 4 and 8, by misusing and forging a cheque belonging to PW8. These contentions were not even understood by lower appellate court or trial court nor was it appreciated by them in the right perspective. On the other hand, it proceeded on a wrong assumption that PW8 is the sister-in-law of the accused and therefore, he could have easily obtained her cheque after his brother's death etc.

20. At any rate, the accused having established that the amount could not have been advanced on the alleged date and also that the cheque Ext. P3 could not have been issued as alleged, the very case set up by the complainant falls to ground and a conviction would not have been possible, except upon perverse findings and conclusions. On going through the records and the judgments of the courts below, I also find that the conviction and sentence passed against the accused under Section 420 IPC are totally unsustainable, on other grounds also.

21. The courts below entered a conviction against the revision petitioner for offence under Section 420 IPC, even without verifying what allegations are made in the charge. Both the courts failed to find out whether ingredients of Section 420 are made out, before entering a conviction against the revision petitioner. As per the police-charge, the accused cheated the complainant, by forging and giving a cheque belonging to PW8, knowing that it was from the account of PW8. But, the gist of the allegations made in the charge framed by the court referring to Ext.P2 are, "on 17.08.1991, the accused issued a cheque for an amount of Rs.14,000/-, which he owed to the complainant.

But, on presentation of the cheque it was returned as "funds insufficient" but, that the said cheque was that of PW8, and from her account and thereby, the accused had intentionally cheated the complainant and committed offence under Section 420 IPC.

22. It is quite clear from a reading of both the above charge that none of the ingredients of Section 420 IPC are disclosed from the charge. It is not specifically mentioned in the charge that the accused had "dishonestly induced" in any manner and that any person was so deceived to deliver any property to any person etc., and thereby, committed an offence of "cheating". The element of "deception" is also not disclosed from the charge at all. The bare essentials required for a charge for the offence under Section 420 IPC are not stated in the charge to attract the ingredients of Section 420 IPC. The allegations made in the charge are totally vague to attract an offence under Section 420 IPC.

23. A reading of Section 211 onwards in Chapter VIII of Cr.P.C reveals the necessity to mention such details in the charge, so as to give notice of the relevant allegations to the

accused. But, this mandate was not complied with. The courts below even failed to verify what exactly are the allegations which attract offence under Section 420 IPC and both the courts below appear to have invented their own case, which are inconsistent with the prosecution case, in order to convict the accused.

24. In the absence of allegations being made in the charge, the court below ought not to have come to any conclusions on the basis of their own imaginations, as to how the accused was cheated. The case which is seen to have been developed by the courts below is not supported either by the charge or the evidence in this case. Learned Magistrate in paragraph 12 of the judgment held, "accused had intention to part with the money of PW3 by issuing Ext. P3, making him to believe that he had account with the said bank and sufficient funds in the credit of his account with the said bank".

25. The appellate court observed in paragraph 17 that the precise question is "whether the appellant had handed over Ext.P2 cheque to PW3 in order to induce PW3 to hand over the original of Ext.P3 to him" and to prove this there is the oral evidence of PW3. It appears that the court below proceeded on

the assumption that the accused cheated PW3 by handing over Ext.P2-cheque, in order to induce PW3 to hand over the original of Ext.P3 to the accused and that is how PW3 was cheated by the accused.

26. There can be no doubt, both the courts have invented a case which neither the complainant or the prosecution had. Thus, the approach made by the court below in developing its own case merely to base a conviction under Section 420 IPC is totally illegal and it deserves an interference. The conviction and sentence passed against the revision petitioner are unsustainable on this ground itself.

For all the above reasons, the conviction and sentence passed against the revision petitioner are unsustainable. The complainant failed to prove his case and the charge does not reveal the relevant facts which constitute the ingredients of the offence under Section 420 IPC and hence, it is not legal to convict an accused, on the basis of the facts concluded by the courts below, especially without giving notice of the relevant allegations constituting offence under Section 420 IPC. The complainant failed to prove that revision petitioner committed

offence under Section 420 IPC and he is therefore, found not guilty of offence under Section 420 IPC and he is acquitted of the said offence. He is set at liberty forthwith.

This revision petition is allowed.

K. HEMA, JUDGE

smp